UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

ENVIRONMENT RHODE ISLAND,
BURTON HOFFMAN, HENRY ROSEMONT, JR.,
DAVID WIXTED, and HENRY T. WROBEL,

Plaintiffs,

CA 08 323S

v.

C.A. No. 08-________

TOWN of MIDDLETOWN,

Defendant

COMPLAINT

NATURE OF THE CASE

1. This is a citizens' suit to enforce the Federal Water Pollution Control Act, 33 U.S.C. § 1251 *et seq.* (the "Clean Water Act" or the "CWA").

JURISDICTION AND VENUE

2. The Court has subject matter jurisdiction over the parties and the subject matter of this action pursuant to Section 505(a)(1) of the Clean Water Act, 33 U.S.C. § 1365(a)(1) and 28 U.S.C. § 1331 and 1367(a).

3. Pursuant to Section 505(c)(1) of the Clean Water Act, 33 U.S.C. § 1365(c)(1), venue lies in this District because the source of the discharge of pollutants is located within this District.

4. Pursuant to Section 505(b) of the Clean Water Act, 33 U.S.C. § 1365(b), Plaintiffs Environment Rhode Island, Burton Hoffman, Henry Rosemont Jr., David Wixted, and Henry T. Wrobel gave notice of the violations alleged in this Complaint more than sixty days prior to commencement of this lawsuit to: (a) Defendant Town of Middletown ("Middletown"), (b) the

United States Environmental Protection Agency ("EPA"), and (c) the Rhode Island Department of Environmental Management ("RIDEM"). The notice was provided in a letter dated June 27, 2008 (the "Notice Letter") and mailed to Middletown, EPA, and RIDEM on that date. A copy of the Notice Letter is attached as Exhibit 1 and incorporated herein.

5. Neither the EPA nor RIDEM has commenced or is diligently prosecuting an action in state or federal court to redress the Clean Water Act violations alleged herein.

PARTIES

6. Plaintiff Environment Rhode Island is a non-profit corporation duly organized under the laws of Rhode Island. Environment Rhode Island is a statewide environmental advocacy organization that is actively engaged in education, research, lobbying, litigation, and citizen organizing to encourage conservation and environmental protection. Environment Rhode Island has approximately 2,300 members in Rhode Island.

7. Environment Rhode Island has members who live and own homes in the Middletown area and who participate in recreational activities in and around nearby Newport Harbor and Easton's Bay. Environment Rhode Island has members who are adversely affected by Defendant's illegal wastewater and storm water discharges. These discharges pose a threat to human health and the environment, and adversely affect the use and enjoyment of these water bodies by Environment Rhode Island's members.

8. Plaintiff Burton Hoffman is a life-long resident of Newport.

9. Plaintiff Henry Rosemont Jr. lives in Newport. He is a member of Environment Rhode Island.

10. Plaintiff David Wixted lives in Newport.

11. Plaintiff Henry T. Wrobel lives in Newport. He is a member of Environment Rhode Island.

12. Defendant Town of Middletown is a municipality incorporated under the laws of the State of Rhode Island. Middletown owns a sanitary sewer system ("Middletown Sewer System"), a separate storm sewer system, ("Middletown Storm Sewer System"), and associated pumping and interceptor systems and discharge outfalls. Throughout this Complaint, this entire system is referred to as the "Middletown System."

13. As the owner and operator of the Middletown System, Middletown is liable for the violations set forth herein.

THE MIDDLETOWN SYSTEM AND ITS WATER QUALITY IMPACT

A. Middletown's Sewer System

14. The Town of Middletown is situated adjacent to the City of Newport, Rhode Island ("Newport"), and has a contract with Newport for the treatment of Middletown's wastewater. The Middletown Sewer System pumps wastewater from domestic, commercial, and industrial sources within Middletown to the Newport Water Pollution Control Plant ("Newport WPCP"), where it is treated prior to discharge to Newport Harbor.

15. During heavy rain, infiltration and inflow of rainwater and rising groundwater into the Middletown Sewer System often overwhelm the System's capacity. This can, and does, cause Middletown to discharge wastewater from its Sewer System at points upstream of the Newport WPCP.

16. One of these discharge points, the Wave Avenue Pump Station, conveys wastewater to Easton's Moat and thus to Easton's Bay with no or limited treatment. The Wave Avenue Pump

Station is located near the Middletown/Newport line, just east of Easton's Beach. The approximate location of this pump station is shown in Exhibit 2.

17. Middletown does not have a Clean Water Act permit authorizing the discharge of wastewater from the Middletown Sewer System.

B. Middletown's Storm Sewer System

18. Middletown is authorized to discharge storm water in accordance with the Rhode Island General Permit for Storm Water Discharge from Small Municipal Separate Storm Sewer Systems, RIPDES No. RIR040000 (the "General Permit"), which was issued by the Rhode Island DEM pursuant to the Clean Water Act.

19. The General Permit contains a number of requirements governing the discharge of storm water in situations in which such discharge poses a threat to water quality, human health, aquatic life, and/or wildlife.

20. Two of the storm water outfalls in Middletown's Storm Sewer System empty directly into Easton's Bay without treatment. These storm water outfalls are located at the east end of Easton's Bay along the Esplanade. The storm water outfalls discharge to Easton's Bay near Atlantic Beach (also called Atlantic Beach Club Beach) and Easton's Beach (also called First Beach). The approximate location of these outfalls is shown in Exhibit 2.

C. Impact on Receiving Waters

21. Easton's Bay is an ecologically sensitive and iconic feature of Rhode Island. RIDEM has designated Easton's Bay as "Class SA" waters. The designated uses for Class SA waters are: shellfish harvesting for direct human consumption; primary and secondary contact recreational activities; and fish and wildlife habitat.

22. Easton's Bay is an important and heavily used resource, and has special aesthetic and

recreational significance for the community and for tourists. It is home to both public and private bathing beaches including Easton's Beach (First Beach) in Newport and Atlantic Beach (Atlantic Beach Club Beach) in Middletown. Together, these beaches offer a mile-long stretch of ocean beach adjacent to the famous cliff walk mansions of Newport. Residents and tourists visit these beaches and surfers use the beaches throughout the year.

23. Discharges of partially treated wastewater and contaminated storm water from the Middletown System harm Easton's Bay and pose a risk to fisheries, wildlife habitat, and human heath. In addition to containing human waste and other sources of bacteria, discharges from the Middletown Sewer System can contain solvents, detergents, cleansers, inks, pesticides, paints, pharmaceuticals, and other chemicals used by households and businesses and then discharged to the Middletown Sewer System. Discharges from the Middletown Storm Sewer System can contain bacteria from animal and/or human waste, as well as a variety of petroleum products and other chemicals.

24. The intensive public use of Easton's Bay and the adjacent beaches increases the likelihood that people will come into direct contact with the pollutants discharged by the Middletown System.

25. The discharges from the Middletown System to Easton's Bay are significant contributors to the frequent closing of swimming beaches and other recreational activity at Atlantic Beach and Easton's Beach. The Rhode Island Department of Health posts the following warning about Easton's Beach and Atlantic Beach on its web site:

> The Department of Health discourages swimming, surfing and other full body contact activities at these beaches for a minimum of 24-hours after heavy rainfall. Heavy rains and discharges from storm water drains directly affect these waters. As a result, these waters may contain high levels of harmful bacteria that may cause illness after a heavy rain.

26. The discharges from the Middletown System to Easton's Bay contribute to violations of water quality standards designed to protect public health and the environment. The discharges from the Wave Avenue Pump Station and the Middletown Storm Sewer System are causing violations of the water quality standards for fecal coliform, enterococcus bacteria, and/or odor in Easton's Bay.

27. Fecal coliform and enterococcus bacteria are prevalent in the intestines of warm-blooded animals, including humans. The presence of these bacteria in water is an indication that fecal contamination may have occurred and that pathogens (disease-carrying agents) may be present. The applicable water quality standards for these bacteria, as well as for odor, are found in the State of Rhode Island and Providence Plantations Department of Environmental Management Water Quality Regulations (July 2006), at Rule 8.D(3), Table 2.

BACKGROUND ON THE CLEAN WATER ACT

28. Section 301(a) of the Clean Water Act, 33 U.S.C. § 1311 (a), prohibits the discharge of any pollutant into navigable waters of the United States from a "point source" unless the discharge is both: (a) covered by a National Pollutant Discharge Elimination System ("NPDES") permit applicable to that point source, and (b) in compliance with the discharge limitations and other conditions set by such a permit (which are to include, at a minimum, all limitations and conditions required by the CWA). In Rhode Island, the NPDES program is known as the Rhode Island Pollutant Discharge Elimination System ("RIPDES") program, and is administered by RIDEM subject to the oversight and ultimate authority of EPA and pursuant to section 402 of the Clean Water Act, 33 U.S.C. § 1342.

29. There are two types of NPDES permits: an individual permit and a general permit. An individual NPDES permit is issued for a particular discharge or set of discharges, and is

applicable only to the owner and/or operator thereof. A general NPDES permit governs a category of similar discharges, and is applicable to all dischargers within that category that apply for and are granted coverage under its terms. Section 402(p) of the Clean Water Act, 33 U.S.C. § 1342(p), establishes a framework under which general permits are often issued to regulate classes and categories of storm water discharges.

30. Under the CWA, NPDES permits may be issued only after public notice of their anticipated provisions and an opportunity for public comment on those provisions. Individual NPDES permits (and some general permits) require periodic discharge monitoring and monthly reporting of the results in a publicly-available format. General storm water permits typically require less frequent monitoring and reporting.

31. CWA sections 301(a) and 301(b)(1)(B) require Publicly Owned Treatment Works – public sewer systems – to meet national effluent discharge limits set by the United States Environmental Protection Agency ("EPA") based on the degree of effluent reduction attainable through the application of secondary sewage treatment.

32. CWA sections 301(a) and 301(b)(1)(C) require all discharges of pollutants from a point source to meet effluent limits necessary to achieve water quality standards in the receiving waters.

33. Pursuant to CWA section 505, 33 U.S.C. § 1365(a), a citizen who has been affected by the violation may commence an enforcement action against one who violates an "effluent standard or limitation" under the Clean Water Act. A violation of an "effluent standard or limitation" includes an unlawful act under Section 301(a) and/or 301(b) of the CWA, and any violation of an NPDES (or RIPDES) permit condition.

34. This "citizen suit" provision of the Clean Water Act grants jurisdiction to United States District Courts to hear such cases, to impose an injunction requiring compliance with the CWA and/or remediation of harm caused by violations of the Act, to impose any appropriate civil penalties for violations of the CWA, and to award costs of litigation (including reasonable attorney and expert witness fees) to the substantially prevailing plaintiff.

COUNT I

DISCHARGE OF WASTEWATER WITHOUT A NPDES PERMIT

35. Clean Water Act sections 301(a) and 402 prohibit the discharge of pollutants to the waters of the United States unless such discharge is covered by, and in compliance with, a NPDES permit. Middletown discharges wastewater from the Wave Avenue Pump Station to Easton's Moat, which empties into Easton's Bay and is tidally affected. Easton's Moat and Easton's Bay are part of the waters of the United States. The wastewater so discharged contains a number of substances defined as "pollutants" under the CWA, such as sewage, industrial waste, municipal waste, solid waste, and biological materials. *See,* generally, 33 U.S.C. § 1362(6).

36. Middletown does not have, has never had, and, to Plaintiffs' knowledge, has never applied for a NPDES permit authorizing it to discharge wastewater from the Wave Avenue Pump Station to waters of the United States. Therefore, every such discharge is a violation of Section 301(a) of the Clean Water Act. Exhibit 3 lists a number of dates known to Plaintiffs when such discharges have occurred.

37. On August 23, 2005, Middletown and RIDEM entered into Consent Agreement No. 04-09 ("the 2005 Consent Agreement") to resolve an administrative enforcement action in which RIDEM alleged violations of the following statutes and/or regulations:

a) The Rhode Island Water Pollution Act.

i. R.I.G.L. 46-12-5(a) – prohibiting the placing of a pollutant in a location where it is likely to enter the waters of the State.

ii. R.I.G.L. 46-12-5(b) – prohibiting the discharge of any pollutant into the waters except pursuant to the terms and conditions of a permit.

b) The DEM's Water Quality Regulations.

i. Rule 11(B) – prohibiting the discharge of pollutants to the waters of the State except as in compliance with the provisions of Chapter 46-12.

ii. Rule 13(A) – prohibiting the discharge of pollutants to the waters of the State without having obtained all required approvals from DEM.

38. The 2005 Consent Agreement assessed a monetary penalty for six discharges from the Wave Avenue Pump Station. The Consent Agreement states that RIDEM's calculation of the penalty was based in part on Middletown's "complete control over the occurrence of the violation." The Consent Agreement further states that "[Middletown] was aware of the [infiltration and inflow] problems and that overflows [discharges] had previously occurred at the Wastewater Collection System since at least January 1999."

39. Middletown will continue to discharge pollutants from the Wave Avenue Pump Station to the waters of the United States without a permit after the date this Complaint is filed.

COUNT II

DISCHARGE OF POLLUTANTS FROM A PUBLICLY OWNED TREATMENT WORKS IN VIOLATION OF NATIONAL SECONDARY TREATMENT LIMITS

40. Paragraphs 1 through 39 are realleged and incorporated by reference herein.

41. Clean Water Act sections 301(a) and 301(b)(1)(B) require Publicly Owned Treatment Works ("POTWs") to meet national effluent discharge limits set by EPA based on the degree of effluent reduction attainable through the application of secondary sewage treatment. EPA's

limits, codified at 40 C.F.R. § 133.102, require 85% removal of biochemical oxygen demand ("BOD") and total suspended solids ("TSS"), and further require that the effluent concentrations of BOD and TSS be no more than 30 mg/L as a 30-day average, and no more than 45 mg/L as a 7-day average.

42. BOD is a measure of the oxygen-consuming capacity of organic matter in wastewater. High levels of BOD can reduce the dissolved oxygen content of the water body into which wastewater is discharged. Low dissolved oxygen levels in a water body can cause damage to fish and other aquatic species by, *inter alia,* disrupting their feeding patterns, reproductive habits, and migration patterns. Sufficiently low dissolved oxygen levels can be lethal to many aquatic species.

43. TSS is a measure of solid matter suspended in wastewater. High levels of TSS in wastewater can be an indication of high levels of organic matter, which will then biodegrade and consume oxygen in the water body into which the wastewater is discharged. High levels of TSS can harm fish by blocking their gills and inhibiting growth and reproduction. Increased TSS can also reduce light penetration into the water body into which wastewater is discharged, potentially slowing plant growth by inhibiting photosynthesis and leading to reduced food for aquatic life and reduced levels of dissolved oxygen. Accumulation of suspended particles in the water body can alter spawning grounds and feeding habitats of fish and other aquatic species.

44. EPA defines POTW as a "treatment works" which is publicly owned by a state or municipality. 40 C.F.R. part 403.3(q). The CWA defines "treatment works" as "any devices and systems used in the storage, treatment, recycling, and reclamation of municipal sewage or industrial wastes of a liquid nature … *including intercepting sewers, outfall sewers, sewage collection systems, pumping, power, and other equipment, and their appurtenances* ...," or "any

other method or system for preventing, abating, storing, treating, separating, or disposing of municipal waste, including storm water runoff, or industrial waste…" 33 U.S.C. §§ 1292(2)(A) & (2)(B) (emphasis added).

45. The Middletown Sewer System is a POTW, as it contains, *inter alia*, sewage collection and pumping systems and related equipment. The Wave Avenue Pump Station, in particular, is used for pumping wastewater collected in the Middletown Sewer System to the Newport WPCP for treatment. Discharges of wastewater from this pump station to Easton's Moat and Easton's Bay thus are required to comply with EPA's national secondary treatment limits.

46. Middletown does not apply BOD or TSS removal technology or methodology to its discharges. Therefore, every time Middletown discharges wastewater from the Wave Avenue Pump Station, such discharge violates EPA's national secondary treatment limits. Exhibit 3 lists a number of dates known to Plaintiffs when such discharges (and thus violations of the secondary treatment limits) have occurred. Such violations will continue after the filing of this Complaint.

COUNT III

VIOLATIONS OF THE RHODE ISLAND ANTI-DEGRADATION POLICY IN VIOLATION OF THE GENERAL STORM WATER PERMIT

47. Paragraphs 1 through 46 are realleged and incorporated by reference herein.

48. The General Permit, ¶ I.B.4.k, prohibits "discharges not in compliance with the state's anti-degradation policy for water quality standards."

49. Rule 18.B. of the Rhode Island Water Quality Regulations, which is part of the state's anti-degradation policy and applies to discharges that began or were expanded after November 28, 1975, prohibits degradation of a water body that interferes with an existing use. Storm water discharges to Easton's Bay from the Middletown System are in ongoing violation of this

provision.

50. The storm water discharges through the Esplanade storm sewer outfalls are new or expanded discharges within the meaning of Rule 18.B. of the Rhode Island Water Quality Regulations. The population of Middletown increased between 1970 and 1990 and the number of housing units in the southern portion of Middletown, adjacent to Easton's Bay, has increased since 1970.

51. The discharges from the Middletown Storm Sewer System to Easton's Bay are significant contributors to the frequent restrictions on swimming and other recreational activities at Easton's Beach and Atlantic Beach, and thus interfere with those uses in violation of the anti-degradation policy. These violations will continue after the filing of this Complaint.

COUNT IV

FAILURE TO ELIMINATE THE CAUSE OF EXCESSIVE BACTERIAL CONTAMINATION IN THE STORM SEWER DISCHARGES

52. Paragraphs 1 through 51 are realleged and incorporated by reference herein.

53. The General Permit, I.D, provides that RIDEM will notify the operator of a storm sewer system if a discharge from that system is "determined to cause or contribute or have the reasonable potential to cause or contribute to the violation of an applicable water quality standard, or to be a significant contributor of pollutants." RIDEM has notified Middletown that the bacteria levels in its storm sewer discharges to Easton's Bay, especially through the two Esplanade storm sewer outfalls, cause or contribute to violations of the water quality standards for fecal coliform and enterococcus bacteria, and are significant contributors of these pollutants to the Bay. Accordingly, Middletown is required by this section of the General Permit to "revise [its] SWPPP [storm water pollution prevention plan] to eliminate the cause or reasonable potential to cause or contribute to a violation of an applicable water quality standard and to

reduce any sources identified as significant contributors of pollutants."

54. In the past five years Middletown has taken some steps to eliminate the causes of bacterial contamination in its storm sewer discharges, including lining of the Esplanade slip, DNA testing of the storm water outfalls, GPS mapping of the storm water catchment area, inventory and inspection of the catchment area, and inspection of homes for illegal connections. Despite these efforts, Middletown has failed to eliminate the causes of the bacterial contamination in its storm sewer discharges, and thus is in violation of the General Permit. These violations will continue after the filing of this Complaint.

AS TO COUNTS I THROUGH IV, INCLUSIVE, PLAINTIFFS AND MEMBERS OF ENVIRONMENT RHODE ISLAND ARE HARMED BY MIDDLETOWN'S CLEAN WATER ACT VIOLATIONS

55. Middletown's failure to apply for, and obtain, an NPDES permit for its discharges from the Wave Avenue Pump Station deprives Plaintiffs of the procedural protections associated with the NPDES permitting process. The absence of regular monitoring data regarding the pollutants discharged from the Wave Avenue Pump Station harms Plaintiffs, in part because the quantities of known (and unknown) discharged pollutants are not publicly available. The Plaintiffs are also concerned that, without the public notice and hearings required during the NPDES permitting process, they are prevented from having input into decisions regarding the discharge of pollutants from the Wave Avenue Pump Station.

56. Plaintiffs Burton Hoffman, Henry Rosemont Jr., David Wixted, and Henry T. Wrobel and members of Plaintiff Environment Rhode Island consider Defendant's illegal pollution to be a blight on Aquidneck Island. Life on Aquidneck Island revolves around the water, and they believe there should be no illegal pollution of the waters off the coastline.

57. Plaintiffs Hoffman, Rosemont, Wixted, and Wrobel and members of Environment Rhode

Island use and enjoy the coastline and waters in and around Middletown, including but not limited to Easton's Beach, Atlantic Beach, King Park, Newport Harbor, and Easton's Bay, for recreational and aesthetic purposes. They sail, swim, picnic, fish, hike, and enjoy the wildlife in and around Newport Harbor and Easton's Bay, but they curtail these activities because of, and their enjoyment of them is diminished by, Defendant's ongoing sanitary sewer overflows, discharges of inadequately treated wastewater, discharges of contaminated storm water, and other violations of the Clean Water Act described above. By way of limited example only:

a. When Mr. Hoffman was young, he would dive off the Esplanade rocks into Easton's Bay. The ongoing pollution degrades his ability to enjoy a walk along Easton's Bay or a familiar swim in the water. When he was young, he would not walk in the stream that connects Easton's Moat to Easton's Bay because he was told it was polluted. He is outraged that fifty years later, the pollution continues.

b. Mr. Rosemont likes to take his grandchildren swimming at Easton's Beach, but because of the storm water discharges and sewer overflows that pollute Easton's Bay, he will not take them if it has recently rained. He is afraid that pollution from the Middletown System would make his grandchildren sick.

c. Mr. Wixted has lived in Newport for twelve years and would like to swim at Easton's Beach, but does not because of the pollution from the Middletown System.

d. Mr. Wrobel moors his sailboat in Newport Harbor. He would like to be able to sail his boat to other harbors along Aquidneck Island, including Easton's Bay, to enjoy a swim from this boat, but worries about disease and infections from the bacteria added to the Bay from the Middletown System.

RELIEF REQUESTED AS TO COUNTS I THROUGH IV, INCLUSIVE

Plaintiffs request that this Court grant the following relief:

1. Declare Middletown to have violated and to be in continuing violation of the Clean Water Act;

2. Issue an injunction ordering Middletown to stop operating the Middletown Sewer System, including the Wave Avenue Pump Station, in violation of the Clean Water Act;

3. Issue an injunction ordering Middletown to stop operating the Middletown Storm Sewer System in violation of the Clean Water Act;

4. Issue an injunction ordering Middletown to remediate the effects of past violations of the Clean Water Act;

5. Order Middletown to pay reasonable attorneys' fees and costs (including expert witness fees), as provided by 33 U.S.C. § 1365(d); and

6. Provide such other and further relief as may be just and proper.

Dated: August 28, 2008

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